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AMERICAN REGISTRY FOR INTERNET NUMBERS, LTD.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

GARY KREMEN, an individual,

Plaintiff,

vs.

AMERICAN REGISTRY FOR INTERNET NUMBERS, LTD., a Virginia corporation,

Defendant.

USDC Case No. **C 06-2554 MMC**

(Assigned to the Honorable Maxine M. Chesney)

NOTICE OF MOTION AND MOTION OF AMERICAN REGISTRY OF INTERNET NUMBERS, LTD. TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO RULE 12(B)(6), OR, ALTERNATIVELY, FOR A STAY; MEMORANDUM OF POINTS AND AUTHORITIES

Hearing

Date: July 14, 2006
Time: 9:00 a.m.
Courtroom: 7

Action Filed: April 12, 2006
TRIAL DATE: NONE SET

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 14, 2006, at 9:00 am, in Courtroom 7, before the Honorable Maxine M. Chesney, Defendant AMERICAN REGISTRY FOR INTERNET NUMBERS, LTD. ("ARIN") will move the Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"), to dismiss with prejudice any and all claims of Plaintiff GARY KREMEN ("Plaintiff" or "Kremen") on the grounds that the Complaint fails to state any claim on which relief can be granted. This Motion is made on each of the following grounds:

1. each claim asserted in the Complaint is barred by applicable statutes of limitations;

2. the Complaint fails to state facts that can support any federal or state antitrust claims under either Section 1 or 2 of the Sherman or California's Cartwright Act; and

3. the Complaint fails to state any state law claims for conversion, breach of fiduciary duty, or unfair competition under California's UCL (B&P Code Section 17200) upon which relief can be granted.

In the alternative to outright dismissal, ARIN respectfully requests that this Court stay the present lawsuit pending disposition of ARIN's motion to modify or clarify this Court's September 17, 2001, Order issued by the Honorable James Ware in the case *Kremen v. Cohen* USDC N.D. Cal. Case No. C98 20718 JW (which motion is concurrently being filed in that action), an order upon which this lawsuit is fundamentally based. This Motion is based on this Notice, the attached Memorandum of Points and Authorities, the exhibits thereto, the records on

file in this action, and such further evidence and argument as may be adduced at the hearing on the Motion.

Dated: June 8, 2006

By: _____
Christopher L. Wanger

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT

I. INTRODUCTION AND SUMMARY OF KEY FACTS

Defendant ARIN is a non-profit Regional Internet Registry (an "RIR") entrusted originally through the government to allocate Internet Protocol ("IP") resources[1] and thereby ensure the efficient and effective operation of the Internet. Evidently concerned that he can not meet the standard terms and conditions required of those seeking the assignment by ARIN of IP resources, plaintiff Kremen has manufactured what is styled an "antitrust" lawsuit premised entirely upon ARIN's refusal to give Kremen an exemption from ARIN's standard terms and conditions. As Kremen himself concedes, ARIN has implemented those standard terms and conditions to control "the allocation, assignment, use and retention of IP addresses." (Complaint for Violation of Antitrust Laws; Conversion; Unfair Business Competition; Breach of Fiduciary Duty ("Complaint"), ¶104). That Kremen obtained a Court order in 2001 that provided for the transfer of certain IP Resources to him from a third-party judgment debtor (Cohen) neither excuses him from compliance with ARIN's standard terms and conditions, nor does it transform them into the predicate for an antitrust suit.

The conduct at issue, which is described in detail in the Complaint (and not disputed for purposes of this Motion only), centers entirely upon the failed negotiations between these two parties relating to the Order dated September 17, 2001 issued by this Court (per the Honorable James Ware) in *Kremen v. Cohen* USDC N.D. Cal. Case No. C98 20718 JW (the "Order," a copy of which is attached hereto as Ex. A) . That Order required ARIN, which was not a party to the underlying *Kremen v. Cohen* litigation, to "register" certain Internet Protocol Resources in

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[1] Plaintiff's Complaint refers to a market for Internet Protocol Addresses ("IP Addresses"), blocks of IP addresses ("Netblocks"), and Autonomous System Numbers ("ASNs") (Complaint, ¶ 9.) Plaintiff considers the IP Addresses, Netblocks and ASNs owned by Stephen Cohen to be "NETBLOCK PROPERTY" that was the subject of a September 2001 Order (which he refers to as the "NETBLOCK ORDER"). (Complaint, ¶12.) For purposes of this Motion, ARIN will collectively refer to the IP Addresses, Netblocks and ASNs that had previously been assigned to Cohen as the "Internet Protocol Resources" or "IP Resources" that are now the subject of this litigation.

Kremen's name.[2] (Complaint, ¶¶ 11-13.) As Kremen impliedly concedes by omission, since the date that ARIN was first made aware of the Order, it has stood fully ready to effectuate the transfers *if Kremen agreed to accept the transfers of the IP Resources subject to the same terms and conditions that applied to Cohen and to other assignees of IP address blocks by ARIN.* Kremen has steadfastly refused to play by the rules that apply to those obtaining IP resources and, as a result, ARIN has been unable to effect the transfer of the IP Resources to Kremen.[3]

Several incurable defects warrant dismissal of Kremen's Complaint with prejudice. First and foremost, Kremen simply waited too long to assert his claims, and they are now time-barred. The applicable statutes of limitation began to run when the "harm" allegedly caused by ARIN's conduct accrued -- when the 2001 Order was entered -- nearly *five* years ago. As a result, each and every claim for relief asserted in the Complaint is barred as a matter of law by the applicable statute of limitations.

Second, the allegations appearing on the face of the Complaint establish that each of Kremen's purported antitrust claims is legally untenable. The *Noerr-Pennington* doctrine precludes lawsuits predicated upon any aspect of litigation, including settlement negotiations. As Kremen concedes that ARIN's alleged conduct was "Designated as confidential settlement communications 'PURSUANT TO §408,' indicating ARIN's intention to negotiate its own settled terms" (Complaint ¶ 50), ARIN's alleged conduct is immune from antitrust scrutiny.

Third, Kremen has not even tried to allege facts establishing that *competition* was harmed in any way as a result of ARIN's conduct or that any illegal combination or conspiracy unreasonably restrained trade. The antitrust laws simply are not designed to coerce compliance with court orders arising out of private civil litigation or to ensure unfettered access to limited resources to all applicants. Rather, they are intended to remedy harms to the *competitive process* – not to individual competitors. Because the only "harm" Kremen has alleged or could allege is

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[2] Pursuant to Local Rule 3-12, ARIN is filing concurrently with this motion and motion in *Kremen v. Cohen* USDC N.D. Cal. Case No. C98 20718 JW to have this case and the *Kremen v. Cohen* case designated as "Related Cases."

[3] Through ARIN's Motion to Clarify this Court's Order, which is being concurrently filed in the *Kremen v. Cohen* case, ARIN seeks essentially a statement by the Court that Kremen is entitled to the transfer of precisely the rights and obligations that Cohen had.

to himself, and he has not identified and cannot identify any concerted action by legally separate "conspirators," his Sherman Act Section 1 claims fail as a matter of law.

Fourth, ARIN's alleged conduct in no way allowed it to acquire or maintain any "monopoly." Kremen has alleged the following conduct by ARIN: (1) refusal to accede to Kremen's interpretation of the Order; and (2) ARIN's insistence that Kremen meet its standard terms and conditions before the transfer will be effected: (a) submission of certain basic information to ARIN (Complaint, ¶¶ 54-61); (b) ARIN's reservation of rights to retrieve or "grab back" IP address blocks for specific misconduct (Complaint, ¶¶ 62-67); and (3) ARIN's alleged "public disclosure" of confidential information (Complaint, ¶¶ 68-71). However, the antitrust laws do not condemn monopolies -- only the *unlawful acquisition and maintenance* of monopoly power through exclusionary conduct. ARIN's position as the exclusive entity responsible for allocation of IP resources in the United States (including the technical coordination and management of Internet number resources) resulted from government action, not exclusionary conduct, and therefore cannot serve as the basis for liability under the Sherman Act claim as a matter of law.

Finally, each of Kremen's state law claims are legally meritless. As discussed at length below, there has been no unlawful conversion, ARIN owes no fiduciary duty and, because there are no viable antitrust claims, no violation of California's Unfair Competition Law (Business & Professions Code §17200).

Kremen's Complaint should be dismissed in its entirety under Rule 12(b)(6), without leave to amend.

II. EACH OF KREMEN'S PURPORTED CLAIMS IS LEGALLY INSUFFICIENT TO STATE A CLAIM FOR RELIEF.

Dismissal under Rule 12(b)(6) can be based on a lack of a cognizable legal theory or the absence of sufficient facts alleged to support such a theory. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). In ruling on a motion to dismiss, a court must accept as true all material allegations in the complaint. *Id.* The Court need not, however, accept conclusory allegations or allegations unsupported by the facts alleged. *Holden v. Hagopian*, 978 F.2d 1115,

1121 (9th Cir. 1992). *See also NL Industries v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); 2 *Moore's Federal Practice*, § 12.34[1][b] (Matthew Bender 3d ed. 2002) ("[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss").

A. The Complaint Should Be Dismissed In Its Entirety Because Each and Every Claim is Time-Barred.

1. ***The Claims Asserted in the April 2006 Complaint Are Subject to a Maximum Limitations Period of Four Years.***

The maximum limitations period applicable to the claims asserted in the Complaint is four years.

Plaintiff's federal antitrust causes of action under the Sherman Act (Claims 1-4; Complaint, ¶¶ 84-114) are subject to a four year statute of limitations. *See* 15 U.S.C. § 15b ("Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.").

A similar four-year statute of limitations applies to Plaintiff's Cartwright Act claim (Claim 5; Complaint, ¶¶ 115-121). Cal. Bus. & Prof. Code §16750.1; *U.S. v. Rosedin Elec., Inc.*, 122 F.R.D. 230, 248 (N.D. Cal. 1987). Plaintiff's statutory Unfair Competition claim under Business and Professions Code Section 17200, *et seq.* (Claim 8; Complaint, ¶¶ 141-147) is also governed by a four-year statute of limitations. Cal. Bus. & Prof. Code § 17208. ("any cause of action pursuant to this chapter shall be commenced within four years after the cause of action has accrued.")

Plaintiff's Conversion claim (Claim 6; Complaint, ¶¶ 122-131) is subject to an even shorter three-year statute of limitations. Cal. Civ. Proc. Code § 338(c); *Stroh v. Grant*, 34 Fed. Appx. 562, 564 (2002). Similarly, Plaintiff's Breach of Fiduciary Duty claim (Claim 7; Complaint, ¶¶ 132-140) is governed by a three-year statute of limitations. Cal. Civ. Code § 3426.6.

As set forth below, Plaintiff had until November 2005 to file the present lawsuit. Accordingly, the Complaint filed on April 12, 2006, must be dismissed with prejudice.

2. ***Plaintiff's Claims Accrued At the Latest in November 2001 Resulting in a November 2005 Deadline to File this Lawsuit.***

The April 2006 Complaint should dismissed in its entirety because Plaintiff's federal antitrust and state law claims asserted therein accrued in November 2001. For a federal or state antitrust suit, "[t]he limitations period begins to run when the defendant commits the acts giving rise to the alleged injury." *Mir v. Little Co. of Mary Hosp.*, 844 F.2d. 646, 646 (9th Cir. 1988); *Pace Indus. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987); *Zenith Radio Corp. v. Hazeltine Res., Inc.*, 401 U.S. 321, 338 (1971) (same). "Generally, an action accrues either when the wrongful act is done, or when the wrongful result occurs, whichever is later." *Harshbarger v. Philip Morris, Inc.*, 2003 WL 23342396, at *1, *6 (N.D. Cal. April 1, 2003) (citing *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 397 (1999); *see also Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1109 (1988). "Ordinarily[, under California law] the statute of limitations applying in conversion actions (Code Civ. Proc., §338 []) begins to run from the date of the conversion even though the injured person is ignorant of his rights." *Bennet v. Hibernia Bank*, 47 Cal. 2d 540, 561 (1956) (citation omitted). "The statute of limitations for [breach of fiduciary duty] claims begins to run when the cause of action accrues." *Intermedics, Inc. v. Ventritex, Inc.*, 822 F. Supp. 634, 640 (1993).

Here, Plaintiff's entire lawsuit is predicated on the September 17, 2001 Order which he alleges "vest[ed] in KREMEN all ownership and other rights in the NETBLOCK PROPERTY… in constructive trust and as a judgment creditor." (Complaint, ¶ 47.) The Complaint concedes on its face that ARIN was on notice of the Order as of November 2001: "***[i]n November 2001*** Plaintiff KREMEN presented Defendant ARIN with this Court's September 2001 NETBLOCK ORDER, which expressly directed ARIN to transfer registration of the specifically identified NETBLOCK PROPERTY to KREMEN." (Complaint, ¶ 49 [emphasis added].) The Complaint further concedes that ARIN's alleged wrongful acts were committed upon its receipt of the Order: "As no less than a ***full, immediate, and uncompromised compliance*** with the [Order] could have

satisfied Plaintiff's entitlement, ARIN has ***at all times been in violation*** of it, and of Plaintiff's legal rights. " (Complaint, ¶ 52 [emphasis added]).

Plaintiff's Complaint further concedes that the damages claimed in the Complaint were incurred immediately upon the issuance of the September 2001 Order (and ARIN's alleged refusal to "comply" with the Order):

> - [Plaintiff's] business and prospective businesses would have benefited greatly if KREMEN would have had control of the NETBLOCK PROPERTY ***from the time of the [September 2001] court order***.
> . . . .
> - Also ***since 2001***, KREMEN has been unable to pursue a variety of business strategies that would have been able to exploit the value of the NETBLOCK PROPERTY.
> . . . .
> - Defendant ARIN's ***refusal to comply with the 2001 NETBLOCK ORDER also harmed KREMEN*** because such purposeful action benefited COHEN . . .

(Complaint, ¶¶ 14-16 [emphasis added]).

It is beyond dispute that Kremen's purported claims accrued no later than November 2001 when ARIN was put on actual notice of the September 2001 Order. Accordingly, by virtue of facts evident on the face of the Complaint, Plaintiff's claims are clearly time-barred and should be dismissed with prejudice.[4]

B. Plaintiff's Sherman Act and Cartwright Act Claims Fail.

1. ***ARIN's Conduct Is Immune From Antitrust Liability.***

Those who petition the government for redress are generally immune from antitrust liability for their petitioning activity. *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135-143 (1961); *Nat'l Flood Servs, Inc. v. Torrent Technologies*, 2006 WL

[4] Rule 11 sanctions are appropriate where, as here, a plaintiff files a claim that is clearly barred by the applicable statute of limitations. *Estate of Blue v. County of Los Angeles*, 120 F.3d 982, 984 (9th Cir. 1997) (affirming the district court's award of sanctions against the plaintiff on a motion to dismiss where the plaintiff's action was clearly time-barred); *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 680 (9th Cir. 1980) (affirming the district court's award of sanctions against the plaintiff's attorney on a motion to dismiss where the court determined that the statute of limitations had run).

1518886, slip op. at *1, *9 (W.D.Wash., May 26, 2006) ("Parties who petition the government for redress are generally immune from antitrust liability"). This "*Noerr*-Pennington" immunity extends to the petitioning of all branches of government, including the judiciary. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-512 (1972). *Noerr-Pennington* immunity also applies to activities *related to* litigation. *Columbia Pictures Indus, Inc. v. Professional Real Estate Inv., Inc.*, 944 F.2d 1525, 1529-1530 (9th Cir. 1991). Such immunity prohibits antitrust suits predicated upon *any* aspect of settlement, including settlement offers and rejections thereof. *Id.* ("A decision to accept or reject an offer of settlement is conduct incidental to the prosecution of the suit and not a separate and distinct activity which might form the basis for antitrust liability.") For instance, the act of sending a demand letter in advance of potential litigation is immunized under *Noerr-Pennington*, and cannot form the basis for an antitrust suit. *See Sosa v. DIRECT TV, Inc.*, 437 F.3d 923, 936-38 (9th Cir. 2006).[5]

The pleading stage is the proper procedural juncture at which a court should recognize and apply *Noerr-Pennington* immunity and dismiss a purported antitrust claim because the alleged conduct is immune from such liability. *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1063 (9th Cir. 1998).

Noerr-Pennington immunizes ARIN from antitrust liability based on Kremen's allegations. As Kremen concedes, ARIN's actions concern compliance with the Order. (*See, e.g.*, Complaint, ¶¶12-13.) Kremen contends the Order required ARIN to transfer to Kremen services related to certain IP Resources. (Complaint, ¶¶12, 13, 16, 49, 51, 52.) ARIN disagreed with Kremen's interpretation of the Order, and entered into settlement negotiations pursuant to

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[5] *Noerr-Pennington* immunity immunizes litigation-related conduct by those who are not named parties to the underlying dispute, provided that they had an interest in the outcome of the litigation. *See Liberty Lake Inv., Inc. v. Magnuson*, 12 F.3d 155, 157-59 (9th Cir. 1993); *Baltimore Scrap Corp. v. David Joseph Co.*, 237 F.3d 394, 400 (4th Cir. 2001); *see also Sosa v. DIRECT TV, Inc., supra*, 437 F.3d at 937 (recognizing with approval its holding in *Liberty Lake*, 12 F.3d at 157-59, "that *Noerr-Pennington* immunity extended to an individual who funded anticompetitive litigation but was not himself a party to the litigation and was therefore not himself petitioning the courts"); *Ludwig v. Superior Ct.*, 37 Cal. App. 4th 8, 17 (1995). Kremen's own allegations establish that ARIN has an interest in the underlying litigation with respect to the Order, as ARIN has taken the position that compliance with Kremen's interpretation of the Order would violate its standard terms and conditions.

Rule 408 of the Federal Rules of Evidence to try to resolve the dispute. (Complaint ¶ 50). Kremen did not accept ARIN's settlement offers and has now sued ARIN for antitrust violations predicated on ARIN's alleged non-compliance. Thus, as Kremen admits, ARIN's conduct is directly related to the underlying litigation, as that litigation produced the Order that is the sole factual predicate for Kremen's purported claims.

2. ***Kremen's First and Second Claims for Relief Fail to State a Claim Under Section 1 of the Sherman Act.***

Kremen purports to state two claims against ARIN under Section 1 of the Sherman Act (15 U.S.C. § 1; hereinafter, "Section 1"). Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Not every business collaboration encompassed by this broad language is illegal. Courts have determined that only combinations that *unreasonably* restrain trade and *harm competition* violate Section 1. *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1101 (9th Cir. 1999).

To state a claim for violation of Section 1, a plaintiff must plead facts which, if true, would establish: (1) that the defendants entered into a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade, either *per se* or under the "rule of reason"; and (3) that the restraint affected interstate commerce. *Tanaka v. University of So. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001). Certain categories of agreements have been recognized as *per se* illegal, plainly and facially anticompetitive, such that courts need not scrutinize the agreements or the relevant business industries looking for harm to competition. *Texaco, Inc. v. Dagher*, ___ U.S. ___, 126 S. Ct. 1276, 1279 (2006). If a plaintiff alternatively alleges a "rule of reason" violation, the plaintiff must assert facts showing an *actual injury to competition*, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged. *McClinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir. 1988). Harm to competition includes, for example, forcing consumers to pay higher prices or the erosion of the quality of choices available to consumers. *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1032 (9th Cir. 1990). In addition, a private-party plaintiff, whether alleging a *per se* or rule-of-reason violation, must also establish

that it suffered injury to its business or property as a proximate result of the alleged combination or conspiracy. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990).

a. **Kremen fails to allege any contract, combination, or conspiracy**

As a matter of law, "a business generally has a right to deal or decline to deal with whomever it likes, as long as it does so independently." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 n. 27 (1985) (citations omitted). Such conduct becomes actionable only in the context of a conspiracy -- an actual concert of action between at least two *legally separate* persons or entities. *Fisher v. City of Berkeley*, 475 U.S. 260, 266 (1986). Vague allegations of concerted action are subject to dismissal. *Llewellyn v. Crothers*, 765 F.2d 769, 775 (9th Cir. 1985) ("Vague and conclusory conspiracy allegations deserve very little respect from the antitrust court."). "The complaint 'must identify the co-conspirators, and describe the nature and effects of the alleged conspiracy.'" *In re Nine West Shoes Antitrust Litig.*, 80 F. Supp. 2d 181, 191 (S.D.N.Y. 2000) (quoting *Cont'l Orthopedic Appliances, Inc. v. Health Ins. Plan of Greater New York, Inc.*, 994 F. Supp. 133, 138) (S.D.N.Y. 1998).

Officers or employees of the same firm do *not* provide the plurality of actors required to establish a Section 1 conspiracy. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984). Mere membership in an organization is not sufficient to show that an individual member is a co-conspirator with the organization. *Hunt v. Mobil Oil Corp.*, 465 F. Supp. 195, 231 (S.D.N.Y. 1978), *aff'd*, 610 F.2d 806 (2d Cir. 1979). Multiple members of the same nonprofit association also do not automatically provide the plurality of actors required to establish a Section 1 conspiracy; the plaintiff must prove the members are independent of each other. *Nat'l Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 99 & n.18 (1985).

Kremen asserts two Section 1 claims but fails to describe with any particularity the participants in the alleged "agreement" or "conspiracy." In fact, Kremen's sole effort to plead the "agreement" or "conspiracy" consists of the following: "ARIN, its individual officers and directors, and its constituent members have agreed together and with ARIN's supporting

organizations to restrain trade…" (Complaint, ¶86.)[6] This statement is simply too vague to satisfy the pleading requirements for Section 1 claims. *See Llewellyn v. Crothers, supra*, 765 F.2d at 775 (holding that "allegations regarding conspiracy between the governmental and private defendants d[id] not negate the antitrust exemptions in this case . . . [where [t]he conspiracy allegations in the complaint are couched in the most vague and conclusory terms"). However, giving the statement its broadest possible interpretation, it appears that Kremen may be alleging an "agreement" or "conspiracy" among as many as three separate groups: (1) ARIN, on the one hand, agreeing/conspiring with its officers and directors, on the other hand; (2) ARIN, on the one hand, agreeing/conspiring with its "constituent members," on the other hand; and (3) ARIN, its officers, directors, and constituent members, on the one hand, agreeing/conspiring with ARIN's "supporting organizations," on the other hand.

Kremen's pleading of the members of the alleged agreement or conspiracy is legally insufficient as to each of these three purported groupings: *First*, a corporation cannot agree or conspire with its own officers or directors, within the meaning of a Section 1 claim. *Copperweld,* 467 U.S. at 769 n.15 ("Nothing in the language of the Sherman Act is inconsistent with the view that corporations cannot conspire with their own officers"). The only officer identified in the Complaint is ARIN's president, Raymond Plzak. (Complaint, ¶¶13, 16, 48-55, 62-66, 68, 73, 77, 78.) However, ARIN's alleged conspiracy with its own President cannot be a Section 1 conspiracy as a matter of law.

Second, a membership organization cannot conspire with its members within the meaning of Section 1 by establishing and enforcing reasonable membership policies. *See American Council of Certified Podiatric Physicians & Surgeons v. American Bd. of Podiatric Surgery*, 185 F.3d 606, 620-22 (6th Cir. 1999) (holding that association's efforts to remain sole certifying authority for its member surgeons cannot reflect Section 1 conspiracy, because challenged conduct is equally consistent with association protecting own independent economic interests as with concerted action). Here, Kremen fails to identify or even define the "constituent members"

[6] The corresponding paragraph in the second claim (Compl., ¶95) is identical except for the substitution of the word "conspired" for "agreed."

with whom ARIN allegedly conspired, so the pleading of this conspiracy fails for vagueness. Even if Kremen could provide more specificity in this regard, ARIN and its members cannot form a Section 1 conspiracy as a matter of law because ARIN's maintenance of requirements for entities to register IP Resources is just as consistent with the preservation of ARIN's goals for allocating IP address space as with concerted action among conspirators. *See id.*; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) ("[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.") (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).) Thus, this defect also cannot be cured by amendment.

Third, Kremen's allegation that ARIN and its supporting organizations participated in a conspiracy is also legally insufficient to sustain a Section 1 claim. Kremen fails to identify or define these supporting organizations or explain how they differ, if at all, from the also-undefined "constituent members." Neither ARIN nor the Court can determine these entities' relationships, if any, to each other. The pleading of this conspiracy also fails for vagueness. *Masco Contractor Servs. East, Inc. v. Beals*, 279 F. Supp. 2d 699, 704 (E.D. Va. 2003) (recognizing that some reasonable particularity in pleading is required for a plaintiff to state a cause of action for violation of federal antitrust laws); *Llewelyn v. Crothers*, *supra*, 765 F.2d at 775 (same).

b. **Kremen fails to allege any unlawful restraint of trade.**

(1) The Complaint fails to allege any harm to competition.

As Kremen has not alleged any *per se* violation of Section 1, the rule-of-reason analysis applies presumptively to the Section 1 claims, under which plaintiff must demonstrate that some contract, combination, or conspiracy is in fact unreasonable and *anticompetitive* before it will be found unlawful. *Texaco*, 126 S.Ct. at 1279. It is well established that antitrust laws are intended to protect competition itself, not individual competitors, who may thrive or languish in a free market. *Am. Ad Mgmt., Inc. v. Gen. Tel. Co.*, 190 F.3d 1051, 1055 (9th Cir. 1999). Generally, the test for harm to competition is whether consumer welfare has been harmed such that there has been a decrease in allocative efficiency and/or an increase in price. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995). Under the rule of reason, courts analyze the harm to

competition along with any justifications or pro-competitive effects to determine whether the practice is reasonable on balance. *County of Tuolumne v. Sonora Community Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., supra*, 475 U.S. at 588..

In numerous cases, courts have dismissed antitrust claims for lack of allegations of significant anticompetitive effects from the challenged conduct, or because the procompetitive justifications for the conduct outweighed any anticompetitive effects:

- *Tanaka*, 252 F.3d at 1062-64 (affirming granting of *motion to dismiss* Section 1 claim of plaintiff, college soccer player at University of Southern California ("USC"), that defendant USC unfairly invoked rule from Pacific-10 (College Athletic) Conference preventing plaintiff's transfer to rival University of California at Los Angeles; plaintiff had an impertinent claim that she had been singled out and treated unfairly, rather than that alleged misconduct caused harm to competition generally);

- *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1027 (10th Cir. 1992) (affirming granting of *motion to dismiss* plaintiff cable television arbitrator's Section 1 price-fixing claim against cable television operators and programmers, because complaint made only conclusory assertions of illegality, and did not allege supporting facts);

- *ESS Tech., Inc. v. PC-TEL, Inc.*, No. C-99-20292 RMW, 1999 WL 33520483, *1, *4 (N.D. Cal. Nov. 4, 1999) (granting *motion to dismiss* plaintiff modem part manufacturing company's Sherman Act claim that defendant holder of patents necessary for compliance with certain technical standards for modems refused to grant license to plaintiff; plaintiff's

allegations that it could not compete in its market without license did not amount to antitrust claim);

- *Granite Partners, L.P. v. Bear, Stearns & Co., Inc.*, 58 F. Supp. 2d 228, 240-43 (S.D.N.Y. 1999) (*dismissing* plaintiffs investment funds' antitrust claim that defendants investment brokers conspired to buy plaintiffs' securities at artificially low prices; plaintiffs failed to show factors besides ordinary market forces coupled with defendants' desire to resell securities quickly caused defendants' profits on resales of securities);

- *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 761, 766 (5th Cir. 2002) (upholding judgment as matter of law for defendant orthodontists' association on Section 1 claim of unlawfully excluding plaintiff individual orthodontist's patented product from market by disciplining him after he advertised product as superior to existing alternatives; plaintiff did not produce valid evidence that defendant's application of its ethical and false-advertising rules against member harmed competition, i.e., product prices or choices, in said market; appellate court also acknowledged legitimate procompetitive justifications for restricting orthodontists from making hard-to-verify advertising claims).

Declining to dismiss a complaint that on its face fails to allege harm to competition merely delays the inevitable, as such lawsuits – after much expense to the parties and waste of judicial resources – invariably meet the same fate at summary judgment. *See, e.g., Christopherson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1174 (9th Cir. 1988) (affirming summary judgment of alleged exclusive dealing claim because plaintiff produced no evidence that arrangement harmed competition); *Carpenter v. Dreschler*, Civ. A. No. 89-0066-H, 1991 WL 332766, *11 (W.D. Va.

May 7, 1991) (holding summary judgment of federal antitrust claims appropriate where plaintiff failed to demonstrate that defendant's acts harmed competition).[7]

In support of his Section 1 claims, Kremen asserts that ARIN refused to abide by his interpretation of the Order purportedly compelling ARIN to transfer the services related to a certain group of IP Resources in Kremen's name unless Kremen complied with ARIN's standard procedures for effectuating such registrations and transfers. (Complaint, ¶¶12, 13, 16, 48-52.)

Kremen alleges *only* harm to *himself*, not harm to *competition*:

> KREMEN could have hosted thousands of his websites using various IP addresses contained in the NETBLOCK PROPERTY, which would have given KREMEN significant advantages in obtaining higher rankings within search engines, such as Google.com. Such high rankings would have translated into increased Internet traffic and greater revenues." (Complaint, ¶14.) "Also since 2001, KREMEN has been unable to pursue a variety of business strategies that would have been able to exploit the value of the NETBLOCK PROPERTY.

(Complaint, ¶15; *see also id.*, ¶¶73-83, for similar complaints.)

This is not harm to competition.

To the extent Kremen's Complaint can be read as denouncing ARIN's standard application procedures as somehow restraining competition generally, the pleading still fails to state a valid Section 1 claim for two separate reasons. *First*, Kremen's allegations of harm to competition are "conclusory and unsupported," which are legally insufficient for an antitrust claim. *Kingray, Inc. v. Nat'l Basketball Ass'n*, 188 F. Supp. 2d 1177, 1186 (S.D. Cal. 2002) ("[T]he essential elements of a private antitrust claim must allege in more than vague and conclusory terms to defeat a motion to dismiss."). Though he provides some detail about alleged injuries that he claims to have suffered *individually,* Kremen does not plead any facts whatsoever that, if proven, would establish a harm to *competition*. (*See* Complaint, ¶¶87-91, 96-99 (containing only conclusory assertions of harm to competition.))

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[7] At summary judgment, the plaintiff has the initial burden of establishing that the restraint produces significant anticompetitive effects within the relevant product and geographic markets. *Toscano v. PGA Tour, Inc.*, 201 F. Supp. 2d 1106, 1121 (E.D. Cal. 2002). If the plaintiff fails to meet this burden, the claim cannot succeed and fails at that point. *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 547 (9th Cir. 1993).

Second, as Kremen's complaint concedes on its face, ARIN's activities have a significant procompetitive effect: assuring the orderly and efficient allocation of limited IP Resources for a number of countries, including the United States, and managing related IP address registries. (Complaint, ¶¶ 26, 29, 34). Even if this Court at this pleading stage accepts Kremen's bald assertion that such conduct is anticompetitive, the Court cannot overlook the plainly procompetitive purposes of that same conduct, as Kremen has also pled. *See Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996). Because even Kremen admits that the allegedly anticompetitive conditions imposed by ARIN upon *all* those who seek to register IP Resources are required by ARIN in order to effectuate its procompetitive goal of ensuring fair and orderly use of Internet address space, such conduct cannot form the basis of a Section 1 claim as a matter of law. *See, e.g., Viazis*, 314 F.3d at 766; *Toscano*, 201 F. Supp. 2d at 1122-23; *Matsushita, supra*, 475 U.S. at 588.

In sum, Kremen's inability to plead facts that articulate harm to competition establishes that ARIN has not restrained trade under the rule of reason.

c. **Kremen fails to allege causal antitrust injury.**

Antitrust injury consists of four elements: (1) unlawful conduct; (2) causing an injury to plaintiff; (3) that flows from that aspect of the conduct which makes it unlawful; and (4) that is of the type that antitrust laws were intended to prevent. *Glenn Holly Entm't, Inc. v. Tektronix, Inc.*, 343 F.3d 1000, 1008 (9th Cir. 2003).

Kremen cannot meet the first requirement for antitrust injury -- unlawful conduct. The unlawful conduct must be unlawful in the sense of violating the antitrust laws. *Glenn Holly*, 343 F.3d at 1009. ARIN's alleged conduct was not only immunized from prosecution under the antitrust laws but also fails to meet the elements of a Sherman Act or Cartwright Act claim. Because Kremen cannot establish that the *conduct* at issue violated antitrust law, he has failed to sustain antitrust injury as a matter of law.

Because ARIN's conduct was not unlawful, it follows that Kremen's alleged injury cannot flow from the aspect of the conduct that was unlawful. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). Even assuming *arguendo* that ARIN's conduct was

somehow unlawful, Kremen still cannot satisfy this element of antitrust injury. If the plaintiff's injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal *per se*. *Glen Holly*, 343 F.3d at 1008. As demonstrated above, and as Kremen admits, ARIN's conduct has legitimate procompetitive justifications and benefits. (Compl., ¶¶ 26, 29, 34).

Even if Kremen could plead the elements of unlawful conduct and injury flowing from the alleged unlawful conduct, Kremen has not and cannot plead the fourth requirement for antitrust injury – harm to competition. As demonstrated above, ARIN's conduct did not inflict harm on competition. Kremen thus cannot establish that he has sustained causal antitrust injury.

3. ***Kremen Fails to State a Claim Under Section 2 of the Sherman Act***

a. **Kremen fails to state a claim for monopolization.**

Kremen's third claim against ARIN is for monopolization under Section 2 of the Sherman Act (15 U.S.C. § 2; hereinafter, "Section 2"). To state a claim for monopolization under Section 2, a plaintiff must show that: (1) the defendant possesses monopoly power in the relevant market; (2) the defendant has willfully acquired or maintained that power through predatory conduct; and (3) the defendant's conduct has caused antitrust injury. *Cost Mgmt. Serv., Inc. v. Washington Nat. Gas Co.*, 99 F.3d 937, 949 (9th Cir. 1996). Additionally, the defendant's conduct must (4) cause injury to competition. *ESS Tech., Inc. v. PC-TEL, Inc.*, No. C-99-20292 RMW, 1999 WL 33520483, at *3 (N.D. Cal. 1999).

(1) ARIN's Alleged Monopoly is not "Illegal."

Mere possession of monopoly power is not a Section 2 violation; a monopoly that arises from "growth or development as a consequence of a superior product, business acumen, or historic accident" is not illegal. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). For example, a patent is a government-sanctioned monopoly. *Illinois Tool Works Inc. v. Independent Ink, Inc.*, __ U.S. __,126 S. Ct. 1281, 1284 (2006). If the plaintiff making a Section 2 monopolization claim identifies as the relevant market one over which the defendant has a *natural* monopoly, the plaintiff has *not* met its burden for an essential element of the claim and it should be dismissed. *TV Communications Network*, 964 F.2d at 1025.

Kremen admits that the Internet cannot function unless each computer seeking connection to the Internet has a unique IP address. (Complaint, ¶20). Otherwise, Internet messages could not be delivered to their intended recipients. It is thus obviously necessary that there be only one entity (per geographic region) assigning and keeping track of IP Resources and related Internet access. (*Cf.* Complaint, ¶¶26-29.) As Kremen further admits, numerous quasi-government agencies and other organizations, by consensus, established ARIN as a nonprofit membership organization to manage the IP address allocation system for the geographic region encompassing the United States, Canada, Antarctica, and parts of the Caribbean. (Complaint, ¶¶27-34.) In other words, to the extent ARIN arguably has a monopoly at all, it obtained it through lawful means.

(2) Kremen has not alleged exclusionary conduct by ARIN, even assuming it has monopoly power.

Only if a monopolist engages in exclusionary conduct to maintain the monopoly can antitrust liability attach. *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir. 2000). Under the antitrust laws, a defendant with monopoly power may *not*, for example, propagate deliberately false advertising, unlawfully disparage the products of competitors, or price products below cost for the predatory purpose of driving competitors out of business. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 287-88 (2d Cir. 1979); *see also Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117-18 (1986) ("Predatory pricing is thus practice 'inimical to purposes of [the antitrust] laws,' *Brunswick*, 429 U.S., at 488, 97 S. Ct., at 697, and one capable of inflicting antitrust injury.") A defendant with monopoly power *may*, however, refuse to deal with a third party with legitimate business justifications. *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1209 (9th Cir. 1997). Specifically, ***an association's establishment and enforcement of rational rules of access or conduct for members does not commit an antitrust violation***. *Gaines v. Nat'l Collegiate Athletic Ass'n*, 746 F. Supp. 738, 745-47 (M.D. Tenn. 1990).

Kremen does not allege that ARIN engaged in exclusionary conduct to maintain the monopoly. All Kremen has alleged is that ARIN insisted on employing its standard procedures to

fulfill Kremen's request to obtain IP Resources. As Kremen concedes, ARIN has legitimate justifications for having such procedures: as the "steward" of a finite number of IP Resources, ARIN must ensure that the finite supply of addresses is put to use efficiently and equitably, fostering robust, diverse Internet content and functionality, and is not mismanaged leading to the inability of the Internet to function. (See, e.g., Complaint, ¶¶26, 34.) ARIN's requirements that registrants of IP Resources have the capacity to use them efficiently, actually use them, and do so lawfully, or else surrender them so that others can use them, are perfectly reasonable and rational. This is not unlawful exclusionary conduct as a matter of law. *See Gaines v. Nat'l Collegiate Athletic Ass'n, supra*, 746 F. Supp. at 745-47. Thus, Kremen fails to allege the second element of a monopolization claim.

(3) Kremen fails to allege harm to competition from the alleged wrongful conduct.

As discussed in subsection B, *supra*, Kremen does not and cannot allege an actual injury to competition, beyond the impact on him personally (notwithstanding the conclusory averments in paragraph 107 of the Complaint). ARIN incorporates that discussion herein by reference. Furthermore, specifically in the Section 2 context, Kremen does not and cannot allege that ARIN has declined to deal with him *in order to create or sustain a monopoly*. Whether ARIN agreed to Kremen's demands and assigned the IP Resources to him unconditionally, as demanded, or rebuffed Kremen's demands and insisted he comply with its standard requirements, ARIN would maintain the same position with respect to allegedly monopolizing the market for IP Resources and services.

b. **Kremen fails to state an attempted monopolization claim.**

Kremen's fourth claim against ARIN is for *attempted* monopolization under Section 2. "A claim of 'attempted monopolization' arises when the danger of monopolization is clear and present, but before a full blown monopoly has been accomplished." *Paladin Assocs. v. Montana Power Co.*, 97 F. Supp. 2d 1013, 1038 (D. Mont. 2000) (citing *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991)). To state a claim for attempted monopolization under Section 2, a plaintiff must show: (1) specific intent to control prices or destroy competition

in the relevant market; (2) predatory or anticompetitive conduct to accomplish the monopolization; (3) dangerous probability of success; and (4) causal antitrust injury. *Spectrum Sports, Inc. v McQuillan*, 506 U.S. 447, 456 (1993); *Cost Mgmt. Serv.*, 99 F.3d at 950.

(1) Kremen fails to allege specific intent to control prices or destroy competition in the relevant market.

Kremen accuses ARIN of intending to destroy him and his business (or at least prevent its expansion). But such intent is not the intent required in an attempted monopolization claim. *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1028 (9th Cir. 1982) ("[I]ntent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation"). Kremen must allege that ARIN had a specific intent to build a monopoly in the industry in which Kremen competes. *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 614, 626 (1953). Kremen is in the Internet advertising business. (Complaint, ¶14.) Kremen does not compete with ARIN in what Kremen identifies as the relevant market, for IP Resources and services. (Complaint, ¶9.) Therefore, ARIN cannot have the requisite intent to destroy competition in the relevant market pursuant to Section 2 of the Sherman Act.

(2) Kremen fails to allege predatory or anticompetitive conduct.

Even if ARIN and Kremen were competitors in the same relevant market, and Kremen pled that ARIN intended to destroy competition in that market, Kremen's claim would still fail because he has not pled and cannot plead predatory or anticompetitive conduct by ARIN.

"The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition *itself*." *Spectrum*, 506 U.S. at 459 (emphasis added). Bringing "sham" litigation, tortiously interfering with contracts and thus creating a dangerous probability of monopolization, or buying out the only other company in a two-company market represent examples of predatory or anticompetitive conduct. *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 100 (2d Cir. 1998); *Hawaii v. Gannett Pac. Corp.*, 99 F. Supp 2d 1241, 1250-51 (D. Haw. 1999).

ARIN's alleged conduct is not anticompetitive, nor could it possibly accomplish monopolization. At worst, ARIN is accused of refusing to register certain IP Resources in

Kremen's name because he refused to follow standard procedure for such registrations. This conduct does not remotely resemble bringing sham litigation or merging companies to create a monopoly in an industry; rather, it promotes competition as it reflects reasonable stewardship of the finite IP Resources. (*Complaint* ¶¶ 26, 29, 34). Kremen thus fails to establish the predatory conduct element of an attempted monopolization claim.

4. ***Kremen Fails to State a Claim Under the Cartwright Act***

Kremen's Fifth Claim for Relief alleges the same underlying facts for the Cartwright Act claim as for the Sherman Act claims. (*Cf. Complaint*, ¶¶85-114 and, ¶¶115-21.) Because analysis under the Cartwright Act mirrors the analysis under the Sherman Act (*Tuolumne*, 236 F.3d at 1160), if a plaintiff pleads both a Sherman Act claim and a Cartwright claim over the same facts, and the court finds the Sherman Act claim defective, it is appropriate for the trial court to dismiss the Cartwright Act claim, as well. *Carter v. Variflex, Inc.*, 101 F. Supp. 2d 1261, 1270 (C.D. Cal. 2000). Accordingly, the Court should dismiss the Cartwright Act claim along with the Sherman Act claims.

C. Plaintiff's Conversion Claim Should Be Dismissed Because The Complaint Fails To State Any Claim Upon Which Relief Can Be Granted

Plaintiff contends that ARIN's alleged failure to follow the Order renders ARIN liable for the conversion of the IP Resources and Netblocks at issue herein. However, Plaintiff's reliance on this theory is misplaced. "Under California law, 'Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.'" *Stan Lee Trading, Inc. v. Holtz*, 649 F. Supp. 577, 580 (C.D. Cal. 1986) (quoting *Hartford Fin. Corp. v. Burns*, 96 Cal. App. 3d 591, 598 (1979). "'The elements of a conversion cause of action [in California] are (1) plaintiffs' ownership or right to possession of the property at the time of the conversion; (2) defendants' conversion by a wrongful act or disposition of plaintiffs' property rights; and (3) damages.'" *American Bankers Mortgage. Corp. v. Federal Home Loan Mortgage Corp.*, 75 F.3d 1401, 1411 (9th Cir. 1996) (quoting *Baldwin v. Marina City Properties, Inc.*, 79 Cal. App. 3d 393, 398 (1978). "To maintain a conversion action 'it is not essential that plaintiff shall be the absolute owner of the property converted but she must

show that she was *entitled to immediate possession at the time of conversion.*'" *Id.* (citation omitted) (italics original).

Here, assuming *arguendo* that the IP Resources at issue in this lawsuit could be considered "property" (which ARIN disputes), Plaintiff's contention as to his "ownership" over the purported property derives solely and exclusively from the September 2001 Order he obtained *ex parte* from Judge Ware in the *Kremen v. Cohen* case. According to Plaintiff's Complaint, ARIN failed to immediately transfer the IP Resources at issue pursuant to the Order, and as such, Plaintiff was "deprived or denied . . his right to possession and use" of the IP Resources. (Complaint, ¶¶ 125, 126).

However, Plaintiff's reliance on the Order as the predicate for his conversion claim is fatally flawed. ARIN was not a party to the *Kremen v. Cohen* case nor was it made a party to Kremen's application for the Order.[8] It is well-established Ninth Circuit precedent that where an individual or entity is not a party to a particular action, that individual or entity is not bound by any judgment or decree resulting from that action as a matter of law nor is any such order enforceable against the non-party. *Zenith Radio Corp. v. Hazeltine Res., Inc.*, 395 U.S. 100, 110; *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940) (same); *Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1050 (9th Cir. 2005) (same); *see also Ins. Corp. of Ireland v. Campagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Hansberry*, 311 U.S. at 41.

Without notice and an opportunity to be heard, ARIN is not bound as a matter of law to the Order and the Order is unenforceable as to ARIN. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466-68 (2000) (finding that absent notice and proper opportunity to be heard, an amendment to a judgment imposing liability on a third party violates that party's due process rights); *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996); *see also Headwaters*, 399 F.3d at 1054. Accordingly, since the Complaint is predicated entirely upon ARIN's alleged obligations that arise exclusively from an Order that is void and unenforceable against ARIN, Plaintiff cannot demonstrate the requisite ownership rights to the IP Resources and Netblocks that are the subject

[8] As noted above, ARIN is seeking modification of the Order in the *Kremen v. Cohen* action.

of the September 2001 Order nor can Plaintiff demonstrate that ARIN wrongfully exercised dominion or control over "property" Plaintiff contends he owns. Dismissal with prejudice of Plaintiff's conversion claim is therefore appropriate.

D. Plaintiff's Breach of Fiduciary Duty Claim Fails To State Any Claim Upon Which Relief Can Be Granted

ARIN owes no duty to Plaintiff as a matter of law. It is well-settled that "[t]he elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." *City of Atascadero v. Merrill* Lynch, 68 Cal. App. 4th 445, 483 (1998). "In order to plead a cause of action for breach of fiduciary duty, there must be an adequate showing of each of these elements." *Id.*

California courts have found a fiduciary relationship to exist only in limited circumstances. *Id.* ("A fiduciary or confidential relationship may arise whenever confidence is reposed by persons in the integrity and good faith of another."); *see, e.g., Women's Federal Savings & Loan Assoc. v. Nevada Nat'l Bank*, 811 F.2d 1255, 1258 (9th Cir. 1987) (holding that a fiduciary duty was established only because the agreement at issue contained explicit language providing that one institution was to act "as a trustee with fiduciary duties" toward the other); *see Rutherford v. Rideout Bank*, 11 Cal. 2d 479, 481-86 (1938) (recognizing the fiduciary relationship between a lending institution and a borrower because such roles often create a relationship of trust and confidence).

The Complaint alleges that ARIN breached a purported fiduciary duty to Kremen in three ways. First, "by way of ARIN's contract with ICANN which charged Defendant ARIN with the obligation of the rightful and fair allocation of resources entrusted to it pursuant to that contract, for the benefit of Plaintiff and others." (Complaint, ¶134). Second, by ARIN's refusal to comply with the September 17, 2001 Order. (Complaint, ¶ 135) ("when [ARIN] refused to transfer the NETBLOCK PROPERTY to Plaintiff, as required by a federal court order"). Third, Kremen alleges that ARIN breach its fiduciary duty through "conversion of Kremen's property entrusted to it . . . [including the] misappropriation of property that belongs to Plaintiff") (Complaint, ¶¶ 136-140).

No contract-based fiduciary relationship is alleged in the Complaint.[9] In addition, the Complaint is devoid of any allegations that ARIN had a trusted role as a close advisor, guide or counselor to Plaintiff, nor does it allege that ARIN assumed any confidence with Plaintiff. ARIN enforced its procedures evenhandedly, and did not allow Plaintiff or his opponents in *Kremen v. Cohen* to circumvent such procedures to the detriment of other registrants. Plaintiff's claim for breach of fiduciary duty is unfounded because ARIN's duty is to provide IP address space and not to protect Plaintiff's financial interests.

Furthermore, as discussed above, Plaintiff's reliance on the September 2001 to create a fiduciary responsibility in ARIN is legally unsupported. Assuming arguendo that the September 2001 Order applies to a non-party like ARIN (which ARIN disputes), Plaintiff's Complaint is devoid of any allegation whatsoever that the Order itself created a close or special fiduciary relationship between ARIN and Plaintiff. Indeed, even if it were to make such a nonsensical assertion, ARIN is aware of no case law that would permit the creation of a fiduciary duty based upon such facts.

Finally, as discussed above, Plaintiff fails to state a claim for conversion. Accordingly, any fiduciary duty claim premised on the conversion claim must equally fail.

E. Plaintiff's Unfair Competition Claim Should Be Dismissed Because The Complaint Fails To State Any Claim Upon Which Relief Can Be Granted

"Business and Professions Code section 17200 *et seq.* (known in California as the "Unfair Competition Law" or "UCL") prohibits the following five different types of wrongful conduct (1) an "unlawful . . . business act or practice[;]" (2) an "unfair . . . business act or practice;" (3) a "fraudulent business act or practice;" (4) "unfair, deceptive, or untrue or misleading advertising;" and (5) "any act prohibited by [Bus. & Prof. Code §§ 17500 – 17577.5]." Cal. Bus. & Prof. Code § 17200. "Unfair competition" under § 17200 "means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or

[9] The Complaint is devoid of any allegations that the contract between ARIN and ICANN includes any explicit language providing that ARIN was to act as a trustee with fiduciary duties to the Plaintiff for good reason -- as no such language exists.

harms competition." *Arizona Cartridge Remanufacturers Ass'n v. Lexmark Int'l Inc.*, 421 F.3d 981, 986 (9th Cir. 2005) (quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999). "Section 17200 is not limited to anticompetitive business practices targeted at rivals, 'but is equally directed toward the right of the public to protection from fraud and deceit,' (citations omitted), and permits "courts to enjoin ongoing wrongful business conduct in whatever context such activity might occur." *Id.*

Here, Plaintiff's unfair competition claim relies entirely upon the conduct that also allegedly forms the basis for the antitrust, conversion and breach of fiduciary duty claims. (Complaint, ¶¶ 142-143). However, for reasons already discussed above, Plaintiff has failed to state a claim upon which relief may be granted as to each of those claims. Accordingly, Plaintiff's claim for violations of the UCL also fails, and dismissal is warranted.

F. This Lawsuit Should Be Stayed Pending Disposition of ARIN's Application to Modify or Clarify the September 2001 Order

It is well-settled in this Circuit that a trial court is vested with broad discretion to stay an action pending resolution of another proceeding:

> A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case. This rule applies whether the separate proceedings are judicial, administrative, or arbitral in character, and does not require that the issues in such proceedings are necessarily controlling on the action before the Court.

Leyva v. Certified Grocers of California, Ltd., 593 F.2d 857, 863-64 (9th Cir. 1979); *see also Landis v. North Am. Co.*, 299 U.S. 248, 254-55 (1936); *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962).

Plaintiff's lawsuit is premised entirely upon ARIN's purported obligations that arise out of the Order that was issued *ex parte* in Plaintiff's *Kremen v. Cohen* lawsuit. While the Order was issued *ex parte* without notice and an opportunity to be heard by ARIN (rendering it unenforceable against ARIN), ARIN is nevertheless willing to submit to the jurisdiction of the Court and the Order if various provisions are modified or clarified. Accordingly, ARIN has filed contemporaneously in *Kremen v. Cohen* a Motion to Modify or Clarify the Order with Judge

Ware. ARIN therefore requests, in the alternative to dismissal, that this Court stay the present action pending the disposition of ARIN's application to modify the September 17, 2001, Order.

Here, staying the instant matter is fully warranted until the Court has had an opportunity to consider whether the Order should be clarified. To permit this action to go forward would result in an injustice to ARIN in that it would create duplicative litigation on the same issues and risk inconsistent judgments. The Court that issued the Order may, *inter alia*, vacate its Order, substantially alter the Order, or mandate compliance with the Order. Any one of these outcomes may moot many, if not all, of the claims asserted in the present litigation.

Moreover, a stay will not harm Plaintiff. Plaintiff waited nearly five years to file this lawsuit after it first allegedly incurred the damages that are asserted in this action. Plaintiff therefore cannot make any showing that staying this action will prejudice or inconvenience him.

III. CONCLUSION

For the reasons set forth above, Defendant American Registry of Internet Numbers, Ltd. respectfully requests that the Court dismiss Plaintiff Gary Kremen's Complaint in its entirety with prejudice.

Dated: June 8, 2006

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